

**WAUKESHA COUNTY BOARD OF ADJUSTMENT
SUMMARY OF MEETING**

The following is a Summary of the Board of Adjustment Meeting held on Wednesday, October 8, 2008, at 6:30 p.m. in Room AC 255/259 of the Waukesha County Administration Center, 515 W. Moreland Blvd., Waukesha County, Wisconsin, 53188.

BOARD MEMBERS PRESENT: James Ward, Chairman
Robert Bartholomew
Ray Dwyer
Tom Day

BOARD MEMBERS ABSENT: Walter Schmidt

SECRETARY TO THE BOARD: Sheri Mount

OTHERS PRESENT: Jason Johnson, BA08:063, owner
Jeff & Mary Fillinger, BA08:062, owners
Aaron Kurek, BA08:061, owner
Charles Stelter, BA08:048, owner
Don Higgins, BA08:048, neighbor
Keith Anderson, BA08:059, petitioner

The following is a record of the motions and decisions made by the Board of Adjustment. Detailed minutes of these proceedings are not produced, however, a taped record of the meeting is kept on file in the office of the Waukesha County Department of Parks and Land Use and a taped copy is available, at cost, upon request.

SUMMARIES OF PREVIOUS MEETINGS:

Mr. Day *I make a motion to approve the Summary of the Meeting of September 24, 2008.*

The motion was seconded by Mr. Bartholomew and carried unanimously.

NEW BUSINESS:

BA08:059 ERIK ANDERSON (OWNER) KEITH ANDERSON (AGENT):

Mr. Ward *I make a motion to deny the request from the floor area ratio requirements and approve the requested variance from the open space requirement of the ordinance, with the following conditions and for the following reasons:*

- 1. A minimum of 10,085 sq. ft. of open space is required. This means that the footprint of the residence, attached garage, and any covered decks, patios, porches, etc. on the property is not to exceed approximately 1,957 sq. ft.*

2. *Prior to the issuance of a Zoning Permit, a detailed Grading and Drainage Plan, showing existing and proposed grades and any proposed retaining walls, must be prepared by a registered landscape architect, surveyor, or engineer and submitted to the Planning and Zoning Division staff for review and approval. This is to ensure that the construction of the residence does not result in adverse drainage onto adjacent properties. The intent is that the property be graded according to the approved plan, and also to provide that the drainage remain on the property or drain to the lake, and not to the neighboring properties or the road.*
3. *Prior to the issuance of a Zoning Permit, the Wisconsin Department of Natural Resources must issue the required Chapter 30 Grading Permit and a copy furnished to Planning & Zoning Division staff. It is solely the property owner's responsibility to ensure that the plan approved by WDNR is also in compliance with all County grading requirements.*
4. *No retaining walls are permitted within 75 ft. of the shoreline.*
5. *No retaining walls will be permitted within 5 ft. of the side lot lines, without approval from the Town of Summit Plan Commission and the Waukesha County Park and Planning Commission.*
6. *The proposed residence must be at least 75 ft. from the ordinary high water mark of Upper Neshotah Lake, as measured to the outer edge of the walls, provided the overhangs do not exceed two (2) ft. in width. If the overhang exceeds two (2) ft. in width, the building must be located the additional distance from the lake as the overhang exceeds two (2) ft. in width. All appurtenances, such as decks, patios, or stairs must also be at least 75 ft. from the ordinary high water mark of the lake.*
7. *No detached structures are permitted.*
8. *Prior to the issuance of a zoning permit, the final construction plans for the residence and attached garage, in conformance with the above conditions, must be submitted to the Planning Division staff for review and approval.*

Reasons: The denial of the request for a floor area ratio variance does not prevent the owner from utilizing the property for a permitted purpose and is not unnecessarily burdensome. A hardship has been defined by the Wisconsin Supreme Court as a situation where compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. It is possible to have 2,348 sq. ft.

of floor area without the need for a variance which clearly provides a reasonable use of the property. Although the petitioner indicates that a floor area ratio variance was granted on the lot next door, it is important to note that the lot next door was much smaller, thereby making compliance with those regulations much more difficult; furthermore, the floor area ratio variance was granted at the time of the Jeffrey Allen court case which made it impossible for the County to enforce the floor area ratio requirements on many properties. It is not reasonable to perpetuate these types of variances now just because of past constraints as the cumulative impact of such actions has a major detrimental impact on the lake and on adjacent landowners. This is precisely why the Ordinance was amended after the Jeffrey Allen case. The open space variance is justified as it will allow the footprint of the residence and attached garage to be a reasonable size and consistent with past decisions in the immediate area. In addition, the open space variance is not significant in this particular case. Therefore, the denial of the floor area ratio variance and conditional approval of the open space variance is within the purpose and intent of the Ordinance.

The motion was seconded by Mr. Bartholomew and carried unanimously.

The Planning and Zoning Division staff's recommendation was for **denial** of the requested variances from the floor area ratio and open space requirements of the Ordinance.

The reasons for the recommendation, as stated in the Staff Report, are as follows:

The denial of this request does not prevent the owner from utilizing the property for a permitted purpose and is not unnecessarily burdensome. A hardship has been defined by the Wisconsin Supreme Court as a situation where compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. It is not necessary to have the currently proposed structure to have a reasonable use of the property. Meeting the open space and floor area ratio requirements allows enough room for a residence to be constructed with a footprint of 1,542 sq. ft. and a total floor area of 2,348 sq. ft. this clearly provides a reasonable use of this property. This would accommodate the currently proposed garage of 532 sq. ft., a first floor of 1,010 sq. ft. and a second floor of 806 sq. ft. This could be accomplished through modifications to the currently proposed house design. Although the petitioner indicates that floor area ratio and open space variances were granted on the lot next door, it is important to note that the lot next door was much smaller, thereby making compliance with those regulations much more difficult; furthermore, the floor area ratio variance was granted at the time of the Jeffrey Allen court case which made it impossible for the County to enforce the floor area ratio requirements on many properties. It is not reasonable to perpetuate these types of variances now just because of past constraints as the cumulative impact of such actions has a major detrimental impact on the lake and on adjacent landowners. This is precisely why the Ordinance was amended after the Jeffrey Allen case. Therefore, the denial of this request is within the purpose and intent of the Ordinance.

BA08:062 JEFF AND MARY FILLINGER:

Mr. Dwyer

*I make a motion to **approve** the request, in accordance with the Staff's recommendation, subject to the conditions set forth in the Staff Report and for the reasons stated in the Staff Report.*

The motion was seconded by Mr. Bartholomew and carried unanimously.

The Planning and Zoning Division staff's recommendation was for **approval** for the requested variances from the floor area ratio and offset requirements of the Ordinance, subject to the following conditions:

1. The residence must be constructed in the proposed location as shown on the Plat of Survey done by Hilmer & Associates LLC Land Surveying dated August 5, 2008.
2. The total floor area on the property is not to exceed 15.6% (3,238 sq. ft.).
3. Prior to the issuance of a Zoning Permit, the Environmental Health Division must certify that the existing septic system is adequate for the proposed construction, or a Sanitary Permit for a new waste disposal system must be issued and a copy furnished to the Planning and Zoning Division staff.
4. Prior to the issuance of a Zoning Permit, a detailed Grading and Drainage Plan, showing existing and proposed grades and any proposed retaining walls, must be prepared by a registered landscape architect, surveyor, or engineer and submitted to the Planning and Zoning Division staff for review and approval. This is to ensure that the construction of the residence does not result in adverse drainage onto adjacent properties. The intent is that the property be graded according to the approved plan, and also to provide that the drainage remain on the property or drain to the lake, and not to the neighboring properties or the road.
5. Prior to the issuance of a Zoning Permit, the Wisconsin Department of Natural Resources must issue the required Chapter 30 Grading Permit and a copy furnished to Planning & Zoning Division staff. It is solely the property owner's responsibility to ensure that the plan approved by WDNR is also in compliance with all County grading requirements.
6. No retaining walls are permitted within 75 ft. of the shoreline.
7. No retaining walls will be permitted within 5 ft. of the side lot lines, without approval from the Town of Oconomowoc Plan Commission and the Waukesha County Park and Planning Commission.

The reasons for the recommendation, as stated in the Staff Report, are as follows:

The approval, as conditioned, provides a reasonable use of the property that is not unnecessarily burdensome and constitutes a much better situation than currently exists on the

property. Although the property is of conforming size, the floor area ratio variance is justified as it will still constitute significantly less floor area than is currently on the property and also results in significantly more open space. In addition, the residence will be located much further back from the Lake and floodplain than would otherwise be permitted. The offset variance is justified as it will still result in a greater offset than the current residence and it will also result in being able to retain two mature, valuable trees. Therefore, the approval of this request, as conditioned, has a positive impact on adjacent owners and the natural resources in the area, and is within the purpose and intent of the Ordinance.

BA08:063 JASON JOHNSON:

Mr. Bartholomew

I make a motion to approve the request, in accordance with the Staff's recommendation, subject to the conditions set forth in the Staff Report and for the reasons stated in the Staff Report, with the following changes to the conditions:

Remove conditions # 3 and 4 due to the fact that removal of the deck and underlying concrete will do more damage to the shoreline than good. It was also determined that the plastic sheds would not have required a zoning permit due to their height, therefore, the condition to remove them is not necessary.

The motion was seconded by Mr. Dwyer and carried unanimously.

The Planning and Zoning Division staff's recommendation was for approval of the requested variances from the road setback, shore setback, floodplain setback, floor area ratio and remodeling a non-conforming structure in excess of 50% of its fair market value requirements and approval of the requested special exception from the offset requirements, subject to the following conditions:

1. The proposed second floor addition must not extend beyond the perimeter of the existing residence, with overhangs not to exceed 2 ft. in width.
2. Prior to the issuance of a Zoning Permit, the final construction plans for the addition must be submitted to Planning and Zoning Staff for review and approval.
3. Prior to the issuance of a Zoning Permit, all of the sheds must be removed from the property.
4. Prior to the expiration of the Zoning Permit, the deck must be cut back so that it is a minimum of 15 ft. from the shoreline.

The reasons for the recommendation, as stated in the Staff Report, are as follows:

It has been demonstrated, as required for a variance, that denial of the requested variances would result in an unnecessary hardship. A hardship has been defined by the Wisconsin Supreme Court as a situation where compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the

owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. The addition will be built within the footprint of the existing structure, which is reasonable as there is not a more conforming location on the property in which to rebuild. Without the floor area ratio variance, the maximum permitted floor area ratio of 19.5% would permit a total floor area of only 451 sq. ft., which is smaller than the existing residence and not in conformance with the district minimum floor area requirements. The proposed second floor addition will not decrease the open space on the property and the addition of the second floor of the residence will still result in a modestly-sized residence, in keeping with other development in the area and not contrary to the public interest. Furthermore, as recommended, this approval will result in the removal of three non-conforming accessory structures and the modification of a deck located right on the shoreline to make it more conforming. It is not reasonable for a property of this size (2,311 sq. ft.) to have multiple accessory structures. Therefore, the approval of this request, with the recommended conditions, is in conformance with the purpose and intent of the Ordinance.

OTHER ITEMS REQUIRING BOARD ACTION:

BA08:048 CHARLES STELTER:

Mr. Dwyer

I make a motion to reconsider our decision of August 27, 2008.

The motion was seconded by Mr. Bartholomew and carried unanimously.

Mr. Dwyer

*I make a motion to **approve** the request for after-the-fact variances from the shore and floodplain setback and an after-the fact special exception from the accessory building floor area ratio on the condition that the shed near the road be removed from the property, for the following reasons:*

Conformance to the 75 ft. shore setback would be a hardship because the shed would then be as far from the lake as the house and its purpose is to store marine and lake-type equipment. The shed is needed for storage on this property. In addition, there is an existing shed on the adjacent property that is located the same distance from the shore and floodplain and it is closer to the lot line than the petitioner is currently proposing to place his shed on the subject property. There isn't another location on the lot that would be substantially more conforming. Further, there is a mature Silver Maple located approximately 75 ft. from the shore where the shed could potentially be placed, thereby making that potentially conforming location unfeasible. Finally, the property is substantially under the total floor area ratio requirements.

The motion was seconded by Mr. Bartholomew. The motion failed with two yes votes from Mr. Dwyer and Mr. Bartholomew and two no votes from Mr. Ward and Mr. Day. Since the Board was equally divided, the motion failed to carry, and the request was not approved.

The Planning and Zoning Division staff's recommendation was for **denial** of the requested after-the-fact variances from the shore and floodplain setback requirements and **denial** of the requested after-the-fact special exception from the accessory building floor area ratio requirements.

The reasons for the recommendation, as stated in the Staff Memorandum dated October 8, 2008, are as follows:

The petitioner has reasonable use of the property with the existing single-family residence, detached garage and additional shed near the road on the property. It is not necessary to have this shed located 20 ft. from the shoreline and 15 ft. from the floodplain to have a reasonable single family residential use of this property. Furthermore, this property has 2,080 sq. ft. of living and storage space without this shed, which is much more than most lake property owners enjoy; i.e. the owner already has a reasonable use of this property. Furthermore, again, accessory structures such as sheds, decks, patios, etc., are amenities to a property, but are not necessary for reasonable residential use of any property. Therefore, it has not been demonstrated, as required for a variance, that denial of the requested variances would result in an unnecessary hardship. A hardship has been defined by the Wisconsin Supreme Court as a situation where compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. Therefore, the approval of this request would not be within the purpose and intent of the Ordinance.

BA08:061 AARON S. KURECK:

Mr. Day *I make a motion to reconsider our decision of September 24, 2008.*

The motion was seconded by Mr. Ward and carried unanimously.

Mr. Bartholomew *I make a motion to **approve** the request for a variance from the offset requirements of the Ordinance to permit the construction of a detached garage a minimum of 12 ft. from the west lot line for the following reasons:*

The offset variance is justified as the property owner relied on a surveyed lot line that turned out to be incorrect. The construction site was already prepared and a substantial number of trees were removed in preparation for construction of the building. The conforming location for the garage may also cause drainage issues. This approval will minimize the amount of tree cutting and land disturbance.

The motion was seconded by Mr. Ward and carried 3-1. Mr. Dwyer voted against the motion.

The Planning and Zoning Division staff's recommendation was for **denial** of the requested variance from the offset requirements of the Ordinance.

The reasons for the recommendation, as stated in the Staff Report dated September 24, 2008, are as follows:

A variance requires a demonstration that denial of the variance would result in an unnecessary hardship. A hardship has been defined by the Wisconsin Supreme Court as a situation where compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. Denial of the requested offset variance would not prevent the property from being used for the permitted purpose of single-family residential use, since it already contains a residence and an attached garage. In addition, it has not been demonstrated that denial of the requested offset variance would result in an unnecessary hardship. A smaller detached garage, in nearly the same location relative to the existing driveway, could be located in conformance with the minimum required 20 ft. offset from the west lot line. However, even if no conforming location existed for any detached garage, the property already contains a three-car attached garage. Therefore, it would not be unnecessarily burdensome to deny a variance to permit an additional detached garage. Further, while the petitioner may desire to construct a 30 ft. deep garage in which to store his 28 ft. pontoon boat, such a garage is not a necessity and a finding of unnecessary hardship may not be based on circumstances that are personal to the property owner. Therefore, the approval of an offset variance to permit the construction of the proposed detached garage would not be in conformance with the purpose and intent of the Ordinance.

ADJOURNMENT:

Mr. Bartholomew *I make a motion to adjourn this meeting at 8:44 p.m.*

The motion was seconded by Mr. Day and carried unanimously.

Respectfully submitted,

Sheri Mount
Secretary, Board of Adjustment